THE COUNCIL OF APPOINTMENT IN NEW YORK.

THE history of the council of appointment in New York is of great importance to the student of American politics, because the power of this body was so employed as to exercise a marked influence on the political morality of not only the state but of the whole country. It was in New York that political offices first came to be regarded as spoils belonging to the dominant party; but when this doctrine had obtained nearly axiomatic force in American politics, few people remembered that it was first recognized in New York or that the New York system was carried into national politics only after the council of appointment had been swept away by the indignation which its corrupting influence had aroused.

The method in which the council was organized as well as the spirit in which its powers were employed are intelligible only as a result of the struggles between the people of New York and the royal governors. The contests of the provincial period turned largely upon the question of the appointing power. Since the royal officials were to be paid from the proceeds of the provincial taxes, the taxpayers claimed for their representatives the right to see that their money was not misappropriated. The New York assembly accordingly strove to gain the right of nominating all those officials whom the province had to support except the royal governor. In this struggle party feeling was strongly developed; and in the time of Governor Clinton the faction which opposed the governor and which was led by De Lancey began to use the patronage of the province for its own ends. In doing this, the De Lancey party simply followed the practice then in vogue in England. The only difference was that in England the patronage was at the disposal of the King's government, while in New York it was controlled by the assembly and its officers. It is very likely

that the recollections of this contest for the appointing power were fresh in the minds of the convention of 1777, which instituted the council of appointment; and that it was because of these recollections that the convention was unwilling to trust either the governor or the senate or the assembly with the sole appointing power. It is of interest, therefore, to trace the history of the appointing power through the provincial period.

I. *The Appointing Power in the Province of New York.*

The province of New York was not an English settlement, but a conquered dependency of the British crown. The King ruled over New York not as a proprietary or charter lord, but as a sovereign prince. He delegated the government of the province to a governor, whose authority was limited only by the royal commission and instructions. But political circumstances and the character of the people made it impossible to maintain the absolute power of the crown. After the Dutch had been finally dispossessed and the Duke of York had received the province from the King, a representative assembly was granted to the freeholders. After a few years the proprietary government lapsed and the assembly, after having granted James a revenue for life, was dissolved. New York became a royal province, but did not receive a charter. The inhabitants, however, steadfastly demanded rights of self-government, and when James II lost his throne these demands were granted.

As proprietor of the province, the Duke of York had conferred the entire appointing power upon his lieutenant; and during his reign as King this power was exercised by the governor and his council. The members of the council were proposed by the governor and appointed by the crown; but in case the number of councillors fell below a quorum, the governor had power to appoint. The governor also exercised the right of taxing the colony for the benefit of his government. The power of the crown over the officials and over the purses of the subjects was equally complete; and we shall see that the people came to regard appointment and taxation as correlative

functions of government, and aimed at the control of both. They desired to secure the appointing power, and as a first step, they demanded the right of voting and apportioning the taxes and supplies.

After the English revolution of 1688 the people (or at least the freeholders) of the province obtained a representative assembly; and from this time New York's politics may be said to date. The appointing power was left with the governor, who was responsible only to the crown. But the granting of the taxes from which the salaries and other governmental expenses were to be paid was in the power of the assembly; and this body, well aware of its power, constantly refused to grant supplies till its grievances were redressed. The governors, treated with more or less indifference by the home authorities, had to contend with the hostility of the French and the never-ending alarms aroused by the Indian confederations. At first the assembly asserted only that it had the sole right to grant taxes, and that the other organs of the colonial government had no right to amend supply or tax bills. The colonial necessities forced the governor's assent to this claim. But this was only the beginning. In 1705 the demand was made that extraordinary grants of money should be administered by a treasurer appointed by and responsible to the assembly alone. This concession the governor refused to make, and for a year the government was left without supplies. In 1706, however, Queen Anne conceded the point in dispute, *viz.* that all extraordinary supplies were to be granted to the treasurer of the assembly. This seemed to imply that henceforth the assembly could also determine what supplies were to be regarded as extraordinary; but on this point there arose a more obstinate conflict. Taking advantage of Governor Hunter's difficulties, the assembly, between the years 1710 and 1714, granted all taxes as extraordinary and tried to limit their duration to one year. This made the governor and the other officials dependent upon the pleasure of the assembly for their salaries. In 1714 accordingly, the crown resolved to pay the governor's salary. This rendered Governor Hunter personally

independent of the assembly; he secured appropriations for longer periods, and it is likely that he would have re-established the power of the crown over the purse, had not the accession of a new dynasty and the disorders of 1715 prevented a resolute assertion of the royal claims.

The appointing power, already undermined by the recognition of the assembly's treasurer, was the next point of attack. The governor insisted, indeed, that no warrant was valid without his signature, even if it were drawn on this treasurer; but the assembly not only maintained its claim to grant supplies on its warrants, but practically brought under its control all officials necessary to the collection and management of the revenue. This was accomplished, even where appropriations had been made for a number of years in advance, by giving the poorly paid government officials extra allowances, the name of the official being inserted in the grant attached to the office. From this point the assembly soon advanced to granting the entire salary of any officers whose names were inserted in the appropriation bills. By the year 1729 the assembly had all but usurped the power of appointing the officials, and had so weakened the responsibility of the governor that it was accused of trying to assert the political independence of the colony. But the English government neglected the remonstrances of its governors and thus strengthened the position of the representative body.

Of course the governors used every means of resistance against the encroachments upon their power. In 1715, for example, Governor Hunter, with the aid of Lewis Morris, made a bargain with the assembly by which the governor secured appropriations for five years. In return Hunter appointed Morris to the chief-justiceship. After this, however, Morris placed his services at the disposal of the party in power in the assembly, who doubled his salary. In 1733 Morris quarrelled with Governor Cosby over the equity jurisdiction which the governor claimed under his commission; and, as Morris's tenure was during pleasure, the governor removed him and appointed De Lancey chief justice, also during pleasure. When Morris

sought an election to the assembly, the governor's influence was sufficient to defeat him. The sheriffs also held during the governor's pleasure, and the sheriff of Westchester refused to allow thirty-eight Quakers to vote for Morris, because they declined to be sworn.

Governor Clarke's long administration accustomed the people to the sight of an aggressive assembly that guarded the rights and interests of its constituents; while the indifference of the crown to the loss of its prerogatives did much to damp any enthusiasm for the party of the governor among those eligible to the council or the assembly. When Admiral Clinton became governor (1743), he found the latter body in control of the patronage of New York and the officers as independent of the governor who commissioned them, as they were dependent on the assembly which salaried them. Annual supplies only were granted; and as all salaries were voted to the officials by name, the power of appointment and removal, as far as the enjoyment or loss of the salary was concerned, was in the hands of the assembly. Governor Clinton's administration left this body even more powerful. At the outset he was hampered by the existence of war between England and France. He had constantly to appeal to the assembly for supplies and taxes; and accordingly onerous conditions were imposed upon every grant. The majority was controlled by Chief Justice De Lancey, one of the ablest men in the colony. Clinton had unwisely reappointed him during good behavior, instead of during pleasure, and had thus made him independent. Under his leadership the assembly put itself in control of the public works and of the Indian department, and finally struck out from its supply bills the names of officers appointed by Clinton, substituting others and forcing the governor to make out commissions to its nominees. Of course the officials came to consider themselves as officers rather of the assembly than of the crown, and the governor could do nothing to remedy this state of things. But before he abandoned the struggle Governor Clinton made a serious effort to re-establish the influence of his office. He refused to sign any annual appropriation or tax bills, and de-

manded a grant of supplies for a long term of years. Both parties understood that the appropriation for a term of years would restore the appointing power and its patronage to the governor. As the assembly had fully ascertained not only how much power but also how much money there was in office-mongering, it refused the governor's demands. As a consequence the salaries of the governor and his nominees were left unpaid; no provision was made for the subsidies to the Indians; the Indian department under Colonel Johnson was at its wit's end, the fortifications were crumbling to pieces, the current bills for supplies were not met — in fact, the government in New York was dissolved through this conflict over the appointing power. Clinton's reiterated reports regarding the helplessness of the governor and the hostility of the De Lancey faction finally forced the home authorities to investigate the matter. But they took up so much time in reaching a decision that Clinton resigned, having first given De Lancey the commission of lieutenant-governor. In the absence of any governor, De Lancey assumed all his functions except that of chancellor. But the contest over the appointing power continued; for De Lancey as governor took very much the same position as Clinton, and Clinton had the satisfaction of seeing him exposed to the same discomforts. De Lancey resisted the annual bills and the usurpation by the assembly of nominations to the offices, both civil and military; but with no better success than his predecessors. In the end, the English crown acknowledged itself beaten by the New York assembly and conceded to the latter the right to make annual appropriations by name and office. In September, 1754, the governor was authorized to assent to annual appropriation bills, and after Governor De Lancey's death, in 1760, the governors were forbidden to receive salaries from the assembly.

The long struggle between the executive and the legislature over the appointing power in the province of New York was accordingly settled, in its main lines at least, when George III ascended the throne. The reports of the governors were no longer filled with complaints about the usurpations of the

assembly, because the governor had henceforth little interest in its action. He was independent as regarded his salary, and the details of government were mainly left to the legislature. There was a tendency to make the speaker of the assembly the executive officer in controlling the expenditures and the appointments to office. At the close of the colonial period, the representative body shifted its attention to controlling the tenure of the judges. The precedent of Clinton's appointment of De Lancey during good behavior was eagerly seized by the assembly; it insisted on the duty of the governor to appoint all the justices during good behavior, while it refused to make any provision for their salaries beyond the annual supply. As Lieutenant-Governor Colden did not dare sanction the wishes of the assembly, another contest broke out. The puisne judges tried to force Colden's hand by their refusal to act unless their commissions were changed to run during good behavior. The English government sent over a mandamus, and Colden made Pratt, the English nominee, chief justice during pleasure; but after a few years Pratt withdrew, the assembly having refused to make any appropriation for his salary.

The years of the Stamp Act agitation followed, and soon the Revolution began with the conflict of Golden Hill, followed by the affair of Lexington. The English governors were still in New York City when the province declared itself a state. During the war two governments existed: one in New York City for the English province; another wandering about under the title of the Convention of the People of the State of New York. In 1777 this convention reported a constitution which became the basis of the new order of things. Before passing, however, to the appointing power under the new state constitution, it is important to realize fully these facts in the provincial history, namely: that a conflict of nearly a century had wrested the power of appointment from the executive and had given it to the assembly; that in this conflict party passion had been strongly awakened; and that intimidation and even bribery were arms which had been employed, and employed successfully, by the partisans on either side.

II. *The Appointing Power from* 1775 *to* 1801.

In 1775 the assembly, which had not been renewed for a very long time, had lost touch with the people; and thus it came about that the people of the colony, in order to express their disapproval of the home-government's policy, elected a new and different body, the provincial Congress, afterwards known as the convention. This body was the *de facto* state of New York, in opposition to the legal government of the crown. It nominated, authorized, constituted and appointed all officers necessary to carry out the wishes of the people of the colony. During the first year, 1775–76, its minutes show that the organization of the army and military appointments chiefly occupied its time. But in July, 1776, after some discussion, it was recognized that this was not state but Continental business. On the 16th of July the convention requested General Washington not only to appoint officers to command the state troops, but also to appoint the officers of the commissariat. The convention then found time to undertake the formation of a government. This it began by extending its sanction to all existing authorities, resolving that all persons in office should remain at their posts so long as they were well disposed, and that all processes and commissions should run in the name of the people of the state of New York. In the following weeks the convention appointed surgeons and instituted a court of admiralty. Meanwhile experience had shown that efficient government required the exercise of certain powers by committees instead of by the convention as a whole. Of all these, the central committee, or council of safety, was the most important. It exercised a collegiate dictatorship over the state when the convention was not in session, and at such times it also exercised the appointing power. It probably did very much to perpetuate the English tradition of the desirability of a second chamber.

A plan of government was brought before the convention during the winter of 1777 and eagerly debated in committee of the whole. The minutes are far from full; yet the amount

of space devoted to the discussion of paragraph 22 of the plan shows how much interest the organization of the appointing power attracted, and how important this power was felt to be. The subject was brought up on April 10th by Mr. Morris's motion "that all civil officers not eligible by the people be appointed by the governor and the judges of the supreme court." He afterwards withdrew this motion, and submitted to the convention the preliminary question: "Whether it would be wise to authorize or permit that the people have a voice in the nomination or appointing of any of the officers?" The plan indicated was not in accord with the feeling of the time. In spite of the fact that the people consisted of freeholders only, the proposition was regarded as too democratic. At a time, moreover, when the disaffected were so numerous that the revolution had much the character of a civil war, the proposal seemed especially hazardous. On the same day Jay, seconded by Morris, brought in his plan for the council of appointment in the following words:

> That all civil officers other than those who by this constitution are directed to be appointed otherwise, shall be appointed in the manner following, to wit: The general assembly shall once in every year openly nominate and appoint one of the senators from each great district, which senators [together with the speaker of the assembly for the time being] shall form a council for the appointment of the said officers, and of which the governor for the time being, or the lieutenant governor or the president of the senate when they shall respectively administer the government, shall be president and have a casting vote but no other vote, and with the advice and consent of the said council shall appoint all the said officers; and that a majority of the said council [with the governor] be a quorum, and further that the same senators shall not be eligible to the said council for two years successively.

The bracketed phrases were not contained in the original motion, but were added by Jay and Morris subsequently. Jay's plan in the main withstood all attacks, either in the committee or in convention. But in the first instance nearly every member of influence had a plan of his own for preventing any

abuse of the appointing power and avoiding a repetition of the contests which had been so frequent in colonial times. That those contests were fresh in the minds of the convention and that they had created a strong prejudice against any one-man power, is evidenced by the decision which was reached as regards the treasurer. It was determined that this officer should be elected by the assembly and senate independently of the governor. The same distrust of the governor underlies all the plans proposed for the bestowal of the state patronage. There was a general inclination to vest the appointing power in the legislature. One plan proposed that the two houses should appoint in each case by a special bill. But this was felt to deprive the governor of all influence and responsibility, and the convention was not prepared to go so far. Another plan gave the legislature the right to nominate two candidates for each office, and restricted the governor's power of appointment to a choice between these nominees. Even this plan did not please the convention, because it left with the governor the power of removing, and this was considered too great a power to be left entirely with one man. Finally the convention returned to the plan of a council. As proposed by Jay, the council of appointment was to be composed of *ex-officio* and elected members. The four senators were to be elected by the assembly once a year, and in such a manner that each of the great sections would be sure of representation. The governor was to be president of the council *ex officio*. To this scheme an amendment was proposed by Captain Platt, vesting the appointing power in five senators and the justices of the supreme court (then three in number), under the presidency of the governor. This plan pleased Jay, but failed to obtain a majority. Jay and Morris then amended their own plan by adding to the council, as a counterpoise against the dreaded power of the governor, the speaker of the assembly, who had exercised great influence during the period immediately preceding the Revolution. In this amended form the plan was reported from the committee and adopted by the convention. On April 19, however, the convention reconsidered its action, and on the motion of

R. R. Livingston removed the speaker from the council. A motion to have a fifth senator of the council appointed by the senate was rejected. The council of appointment thus finally assumed about the form originally suggested by Jay. Together with the power of appointment the council was vested with the right to dismiss from service any officer whose tenure was not fixed by the constitution.

In its provisions regarding the tenure of various officials, the convention showed again the influence of colonial experiences. On all those points which had agitated the colony and which had been subjects of complaint against the English government, the convention meant to bind the hands of both the governor and the legislature. The question of the annual appointment of sheriffs and coroners had been debated for eighty years. These administrative and fiscal officers exercised a considerable power in their counties, and therefore the people had desired to have them in office as short a time as possible. The convention provided for the annual appointment of these officers, with a prohibition against reappointment for more than four consecutive terms. Even in the counties the one-man power was to be guarded against. In the colonial period, again, the judicial tenure had been a very vexed question. The new state constitution made the judges of the state courts and the presiding judge of each county court of common pleas independent of legislature and governor and irremovable except for cause. For all inferior courts it was required that the commissions should be renewed at least once every three years.

In judging Jay's council of appointment from a modern point of view, the error contained in the plan is evident enough. We have ceased to fear the one-man power where the responsibility is commensurate with the power; and we prefer to entrust discretionary duties to individuals rather than to boards, because in the latter responsibility is so divided that in the end it entirely disappears. But it must be remembered that Jay had no idea that the senatorial members of the council would usurp the governor's right of nomination. The council was not designed to destroy the power of the governor, but to prevent

the misuse of his power. And it must always be remembered that the experiences of the colonial period had convinced every one that such checks upon the executive were absolutely essential to liberty and to good government.

Before the new government could be set working, it must be organized; and this was done as rapidly as possible. On April 20, 1777, the convention ordered the publication of the constitution at Kingston Court House. In the early days of May it appointed a long list of officers, both state and local, adopting in respect to the latter the suggestions of those of its members who were at the same time chairmen of the various local committees of safety. On the 13th of May, after having conferred the appointing power with the other prerogatives of a temporary government upon its committee of safety, the convention was dissolved. Between the 21st and the 28th of May this committee nominated officers for many regiments. On the 22d and 23d of May, Jay and Livingston took oaths as chief justice and chancellor and Egbert Benson as attorney and solicitor general before the president of the committee. Towards the end of June Yates and Hobart qualified before the committee as puisne judges of the supreme court. In June the sheriffs were ordered to hold elections for governor, lieutenant-governor, senators and assemblymen from the great districts. On July 9 the committee declared that the freeholders had elected George Clinton to be both governor and lieutenant-governor, and that he must resign one of the two offices. Clinton chose the governorship, and on the 30th of July took oath before the president of the committee. The new government was now in working order, but the committee of safety did not disband until January 14, 1778. It worked side by side with the regular government for nearly six months, and made appointments as late as January 3, 1778, although the council of appointment had already begun its labors. Among the last appointees of the committee were two clerks for the council of appointment.

The first council of appointment met at Kingston, on the 20th of September, 1777, and was composed of Governor George

Clinton and Senators J. M. Scott, A. Yates, J. Woodhull and A. Webster. On the 22d it began to make history by creating Richard Hatfield county clerk of Westchester. Two days later it voted to give to the county clerks the offices of clerks of the inferior courts of common pleas, clerks of the peace and clerks of the sessions of the peace, thus putting them on nearly all county commissions, except that of oyer and terminer. On the 17th of October it appointed Livingston and Jay, Yates and Hobart to the judicial positions to which the committee of safety had already appointed them; to the end, obviously, that their constitutional tenure might not be called into question because of their appointment by an extra-constitutional body.

The real work of the council began in 1778. At first, its powers were exercised in a very conservative spirit. During the continuance of the struggle with England it was of course necessary to restrict the offices to the friends of independence; but it was not customary to employ the patronage of the state to strengthen any particular group of patriots or to increase the political following of any particular leader. The proscription of all opponents was not yet the rule; nor was it yet perceived that the principle of rotation in office might be so applied as greatly to increase the number of rewards available for friends.

The germ of the rotation principle was indeed contained in the constitutional provision which prohibited the council from reappointing the same person sheriff or coroner for more than four consecutive years. The intention, of course, was to prevent county offices from becoming life-estates and the county officers from becoming too powerful. But the actual effect of the rule, as applied by the council, was to rotate a few persons through a series of offices. We find that efficient officers were kept constantly in the public service, now as sheriffs, now as coroners and again as surrogates. The local sentiment seems to have favored this system; and the council, in making local appointments, seems to have been influenced mainly by the wishes of the localities. In fact the offices to be bestowed throughout the state were so numerous that the council could

not possibly investigate the qualifications of each appointee, but was forced to depend largely upon local suggestions.

In some counties this system resulted in the construction of family "machines." We find brothers succeeding brothers and sons following fathers in the same local office, or simply redistributing the offices among themselves from term to term. In other counties certain great families, through direct influence with the council of appointment put their *protégés* into such offices as they desire and keep them there as long as suits the family interest. This development of family influence was not due to the organization of the council, although the dispensation of patronage by so small a body undoubtedly aided its growth and facilitated its exercise. It was really a result of the limitation of the franchise. With a limited electorate the political machinery is regularly controlled by a few leading families. Under such a system the politicians do not expect to live from politics. It is because they have already the means of existence that they are able to devote themselves to politics. What they desire is honor and power. With a widened suffrage a more elaborate and costly machinery is required; it becomes necessary to have solid rewards for services rendered; political management becomes a means of livelihood, and patronage plays a different rôle.

In the absence of any constitutional guarantee of tenure (such as the higher judges enjoyed), the council had the power of removal from office. At the outset there were few removals without cause. But in filling the peace commissions for the counties, the council fixed the time for which their powers should run. In many cases the term was no longer than three months, and the commissions had from twenty-five to fifty-five members, whose continuance depended on the pleasure of the council, or in reality, on that of the senator representing their grand district. Among the more important commissions were those of *dedimus potestatem* and oyer and terminer with gaol delivery. By the *dedimus potestatem*, the people of the state gave specified persons the right to administer oaths within the county, while certain prominent citizens and officials were

named in a like commission for the entire state. The commission of oyer and terminer always included the chief justice and puisne justices of the supreme court in every county, and one of them always was to hold court. The county members on this commission seem to include the most prominent former office-holders, although new names often appear.

As long as the war lasted, the appointment of military officers constituted an important part of the work of the council. The multitude of corrections in names, rankings and dates which the records disclose show how hurriedly the council had to act and how little direct examination each case could have received. Even after the war, the unsettled state of the country did much to keep the council busy in filling the places of officers who had removed from their militia districts or who had resigned or received higher rank. After the federal constitution went into effect, the council of course had only militia appointments to make. The higher positions were commonly conferred upon county magnates, friends of the ruling families, *etc.* The commissioned officers of the lower grades seem to have owed their appointment to the choice of their soldiers.

The work of the council was done very quietly during the first ten years. It was practically undisturbed by party strife, because no clearly marked party lines had yet been drawn. There was rivalry between the great families, particularly between the Clintons on the one side and the Livingstons and Schuylers on the other; but there were as yet no true parties. But when the question of the adoption of the Philadelphia constitution came up, these rivals took opposite sides and the formation of parties began. Clinton was opposed to the new constitution on many grounds, not the least decisive of which, perhaps, were personal. Under the new Union the state would lose much of its independence, and therefore his importance as first man in the state would be diminished. The Livingstons and the Schuylers, on the other hand, with whom Alexander Hamilton had connected himself, not only favored the new constitution on public grounds but saw in the issue thus raised an opportunity of driving Governor Clinton from

power. The more wide-spreading results of the ensuing conflict do not here concern us, and they are too well known to require recapitulation. Important, however, for the purpose of the present study is Hamilton's attack upon the council of appointment as a whole, and upon the governor's position in the council.

In his discussion of the appointing power in the *Federalist*, Hamilton maintained that the plan contained in the Philadelphia constitution was better adapted to secure good appointments than the plan followed in New York. In criticising the latter system, Hamilton dwelt upon the secrecy with which the council acted, and the impossibility of penetrating its motives. He insinuated that corrupt considerations might easily influence the actions of such a body; the more easily because the responsibility was divided. The responsibility for nominations even did not rest wholly on the governor, because, according to Hamilton, the sole right of the governor to nominate to office was not at all settled. As Hamilton construed the constitution, the senatorial members of the council possessed a concurrent right of nomination.

This was a new point. Neither Jay, the author of the council, nor Clinton, its first president, had regarded the council as anything but a check upon the governor, or attributed to it any other power than that of withholding its consent. It is of course possible that Hamilton advanced his new construction only to score a point in favor of the clearly defined power of the President of the United States; but it is certainly improbable that so shrewd a politician did not foresee the results which his suggestion might have in state politics. As a matter of fact we shall see that when the Federalists obtained control of Clinton's council, they asserted their right to nominate; and when the situation was reversed, the younger Clinton used the precedent so cleverly as to destroy the appointing power of the governor.

The first conflict between the governor and the council of appointment had taken place in 1781. The senate had expelled one of its members, who was also, by the choice of the assem-

bly, a member of the council. The assembly proceeded to fill the resulting vacancy in the council by electing another senator. To this the governor objected, on the ground that the constitution gave the assembly the right to elect a council once only in every year. Clinton's attitude seems to have been determined simply by a desire to enforce the constitution as he understood it. It is not apparent that it was of political advantage to him to distribute the patronage with but three members instead of four. The governor's objection did not prevail; the fourth senator (Parker), against whose admission the protest was directed, remained in the council.

The next instance in which the council asserted its authority over the governor, was in the formal matter of signing the record. From September, 1777, to December, 1788, the record of the appointments was sometimes signed by the president and the council, and sometimes left unsigned. In connection with some of the earliest appointments the minutes show a blank space which never was filled up. It had never been claimed that the appointments were invalidated by this formal defect. When, however, in December, 1788, Clinton alone signed the record, his council at its meeting of January 30, 1789, proceeded to rehearse and re-enact the December appointments and signed the record in order to give validity to the appointments.

In both of these cases, we note a tendency on the part of the council — a tendency soon to be converted into a conscious effort — to become a motor in state politics rather than remain simply a restraining cog on the governor's power. The next step of course was to assert the right of each member to nominate, which would give the majority the control of the whole state patronage.

In spite of the comparatively small population of the state, the stake in play in the ensuing contest was very great. Except the state treasurer, all state officers in the administration and in the courts were appointed by the council. The same body filled the county commissions for the peace, oyer and terminer, and *dedimus potestatem*. In the three cities of Albany, New

York and Hudson, it appointed the mayor, clerk, recorder and city marshals, besides cullers of staves and heading, packers of beef, inspectors of pearl ashes and potashes and inspectors of flour. In the ports of New York and Sag Harbor the state had secured the right of appointing the customs officers. In 1781 this right had been surrendered to the United States, but in 1786 the state resumed it. Thus the council of appointment could appoint collectors of the port, land and tide waiters, gaugers, weighmasters, portmasters, portwardens, pilots, quarantine officers, weighers and sealers, measurers of beams and weights and recoverers of goods from wrecks.

It seems that these offices had thus far been bestowed in such a wise as to give satisfaction to the various classes of the people, and even to such subjects of the state as were not freeholders. The offices were not as yet used as payment of campaign service, because party strife had not yet become sufficiently envenomed. Under Governor Clinton no removals had been made for political cause. It was primarily the action of the Federalists that changed New York politics. In their attempt to strengthen the hands of the federal government, they dispensed its patronage to suit their ends. As soon as they obtained control of the New York legislature, they sought to obtain the state patronage also. To this end it was necessary to break the hold which Governor Clinton had upon the appointing machinery.

The great contest between the governor and his council began in 1794, on the question of appointing a fifth justice to the supreme court. The convention had started this court with a chief justice and two puisne justices. But in 1792 the increasing business of the court rendered the appointment of a fourth justice necessary; and by the casting vote of Clinton, Burr was appointed. After his refusal of the office, Lewis was made fourth judge. A year later a fifth judge was declared to be required, but Clinton refused to make any nomination. In 1794 the legislature (now controlled by the Federalists) forced Clinton's hand. Mr. Hoffmann, in the assembly, attacked the existing council so severely that although it had not been

in office one year, a new council was elected on the ground of political necessity. Political necessity meant in 1794 that the Federalists proposed to control the appointing power. The existing council contained three Democratic members. The new council, elected in spite of violent opposition, contained three Federalist members. These, in obedience to the party mandates, disregarded the claim of Governor Clinton to the exclusive right of nomination, and, on a nomination made by one of themselves, appointed Egbert Benson the fifth judge. Governor Clinton did not dissolve the council, but entered a protest against its action. He maintained that the governor had the sole right to nominate, and he pointed out that the usurpation of this power by the senators destroyed his responsibility for appointments. The Federalist majority did not believe themselves wrong; nor does it appear that the people generally sympathized with the governor. The fear of a strong executive had become a tradition — almost a hereditary sentiment, and it did not abate in the public mind even after the governor was elected by the people. In fact, of course, the governor represented the people more directly than the council, chosen by the assembly from among the senators; but the council, annually chosen by an annually elected assembly, was a more perfect index of the fluctuating sentiment of the state. By contrast, the governor represented the stable element of authority.

The appointing power once in their hands, the Federalist majority in the council proceeded to utilize it. One of the first measures adopted was intended to reward their supporters without removing their opponents. In all cases in which the number of such officers as judges and justices of the peace was fixed only by custom, the council decided that the number to be appointed lay entirely in its discretion. It was thus enabled to appoint in each case a sufficient number of its political adherents to outvote the older appointees. In some commissions, which at first had about twenty members, we find later forty or fifty. It is certain that the counties concerned had not doubled in population, and there is no evidence that

they had grown twice as lawless. When it came to the sheriffs and coroners it was easier to strengthen the Federalist cause. These officers had only an annual term; and the council had only to oppose the reappointment of Clinton's sheriffs. A stronger conviction now appears of the value of rotation in office. Officers holding for short terms were less and less frequently reappointed; and long before Burr and De Witt Clinton were accused by their enemies of having corrupted the political ethics of New York, offices had begun to be regarded as "good things" to be distributed, rather than as public functions to be discharged.

Governor Clinton of course protested against the acts of the majority and the motives which determined them. He told the council that its refusal to reappoint the officers with an annual term amounted to displacing them, and this it had no right to do. He was responsible for the conduct of the administration, and was therefore entitled to choose the subordinate agents of government. He tried to show the council that its action would discourage high-minded men from seeking office, and would further injure the public service by inducing the officials to devote more time to electioneering than to the proper discharge of their duties. All these arguments were sound, but they had little effect upon men who were acting from motives of interest and expediency. The council, however, felt it necessary to retort; and it tried to show that the governor was no better than those whom he criticised. Clinton, they declared, had appointed a military officer out of course, and had refused to reappoint an over-zealous Federalist as sheriff. When we remember that Clinton had been governor for seventeen years, these two cases of partisan use of power do not seem to constitute a grave indictment.

But if the governor was triumphant in the argument, all the substantial fruits of victory were in the hands of the senators. They had maintained their claim of a right of nomination concurrent with that of the governor, and this amounted to the power of appointment. They had changed the practice of the constitution in regard to the actual term of the annual appointees.

Instead of simply checking the governor, the council threatened to become the irresponsible ruler of the entire administrative service. The dream of the constitution-makers that the question of the appointing power was settled was dissipated by the political aggressiveness of the legislature. There was a touch of irony in the fact that Clinton's successor, Governor Jay, the framer of the council of appointment, was forced to ask the legislature to construe the supreme law he had made at Kingston. In view of the difficulty which Clinton had had with his council, Jay's first measure was to try to have the legislature pass a declaratory law, deciding whether the council had the concurrent right of nomination, or the governor the exclusive right. As Jay was himself a Federalist, he hoped that the Federalist legislature would confront the question in a judicial spirit. But unfortunately his supporters were not willing, for the sake of affirming a mere principle, to put their party friends of Clinton's council in the wrong. A bill introduced by Morris, declaring that the governor had the exclusive right of nomination, failed to pass in the assembly. The Federalist leaders were the less willing to tie the hands of their senators, because they meant to use the state patronage to assist Hamilton in building up a machine to perpetuate the Federalist régime, and they rightly judged that Jay was too high-minded and scrupulous a man to lend himself to such a scheme.

But while the assembly was unwilling to affirm the governor's exclusive right to nominate, neither did they deny it. It was not absolutely necessary to decide the question, as long as the governor and the majority of the council belonged to the same party. Both were naturally desirous of avoiding open conflict; and although once, at least, the council overrode the governor, appointing (in 1798) a secretary of state whom he did not desire, for the most part such conflicts were avoided. Under these circumstances Jay succeeded in restraining to some extent the partisan zeal of his friends. It was his principle never to make a removal for partisan reasons; and although he did remove a Democratic sheriff in New York

and install a Federalist in his place, in the main he adhered to his principle.

The number of offices in the control of the council received some important additions during Jay's administration. The office of state controller was created, with the power of appointment in the council. To this officer were given all the more important functions previously exercised by the state treasurer. In declaring that the state treasurer should be elected by the two houses, the constitution had placed him beyond the reach of the council. This was precisely what the politicians objected to. They had found that the appointees of the council were most amenable to party control. As they could not do away with the treasurer, nor change the method of appointing him, they resorted to the above device for superseding him. Among other new officers the assistant attorneys-general should be mentioned. As their name implies, they represented the prosecuting officer of the people. One of these assistants was to serve in each of the great districts of the state; and justice became more certain and punishment more rapid than had previously been possible.

In the year 1800 the Federalists lost their majority in the legislature. But the governor and the council of appointment were still Federalist; so that the situation was that of 1794 reversed, the Democrats standing now where the Federalists stood then. Soon after the assembly had organized, it tried to turn the existing council out of office, although the legal term of that body had not yet expired. In this the Democrats were defeated; and it was only after the Federalist senators had served their term (in January, 1801) that the Democrats elected their council. It contained three Democratic members: the turncoat Spencer, who had left the Federalist party because he had failed to secure the controllership; De Witt Clinton, nephew of ex-Governor Clinton, the coming political leader of the state Democracy; and Roseboom, of whom no one expected anything but blind obedience to his leaders. Governor Jay met this council for the first time on February 11, 1801, and the battle began. Governor Jay nominated Thompson

for the shrievalty of Dutchess. The Democratic majority of the council failed to concur. Jay then nominated in succession seven other names; but none of them pleased the council. Thereupon Jay made nominations for several other offices, upon which the council acted. A week later (February 18) Jay again took up the shrievalty of Dutchess, and his ninth nominee, Williams, was appointed by the council. The historian Hammond (the leading authority upon this period of New York history) indicates the reason: Williams was a Democrat. At the third meeting (February 24) issue was joined upon the right of nomination. Hamilton's theory, adopted by the Federalists in their conflict with George Clinton, was now turned against the Federalist governor by George Clinton's nephew. Jay introduced a series of nominations for the various shrievalties that were to become vacant in the fall. All his nominees were voted down by the council. At this point De Witt Clinton nominated J. Blake for sheriff of Orange. Jay not only refused to put the question, but nominated Nicholson for the office. On this nomination the council refused to vote. The opposing claims, that of the governor to exclusive nomination and that of the council to concurrent nomination, were here, for the first time, unflinchingly pushed to their logical consequences; and the result was a complete deadlock.

Jay adjourned the council, and never summoned it again. He was determined, if possible, to hand the governor's prerogative unimpaired to his successor, and to this end he made another series of attempts upon the central question: Who had the right to nominate? He had already addressed this question to the judges. They refused to give a decision or even an expression of opinion, on the ground that the question was not one of law, but of politics. He now sent a message to the legislature, asking them again to declare what the law was, and whether he ought to share the nominating power with the senators or keep it intact. Jay's very objective mind treated the attempt of the council as perfectly explicable on the ground of political differences, and excusable because the question had been raised several times and never authoritatively determined.

He renewed his argument on the merits of the case, and ended by warning the legislature that a decision in favor of the senatorial members of the council would give them the exclusive right of nomination. Neither party in either house of the legislature could well support the governor in his plea for the rights of his office, for each had in turn assailed his prerogative. But since a decision was obviously necessary, the legislature referred the question to the supreme power in the state, a convention of the people. The constitution of 1777, however, had made no provision for its own amendment. Legally, therefore, the convention could only declare what it believed the people meant by the paragraph on the council of appointment, and its declaration could have only a moral weight. Practically the convention would declare what it desired, and its decision would be received as final.

The convention met in October, 1801. The tide was still running strongly against the Federalists; in this year the Democratic freeholders elected George Clinton governor; and nearly all the members of the convention were Democrats. Aaron Burr, now Vice-President of the United States, was chosen president of this convention. The case of the council was presented by De Witt Clinton. As both parties had usurped the right of nomination whenever they possessed a majority in the council, and as no one held a brief for the governor, there was little opposition to Clinton's construction, which gave all the members of the council the concurrent right to nominate for office. Only fourteen votes were cast in the negative. Among the fourteen were W. Van Ness, Burr's great defender, and D. D. Tompkins, who afterwards became governor and was a member of the convention of 1821, which abolished the council of appointment. At that time he recalled with pride his vote cast twenty years before. He said: "The convention of 1801 was assembled to sanction a violent construction of the constitution. Then the maxim was to strip the governor of as much power as possible." This was literally true. The first governor who felt the new state of affairs was George Clinton, whose nephew, De Witt Clinton, as leader of the council, from

this time forth tried to build up a machine by the distribution of patronage.

In considering the evolution of the spoils system down to this point (1801), it should be noted, as Hammond insists, that the quarrel between the governor and council had turned almost exclusively upon questions of reappointment. Officers whose terms, whether fixed by law or by custom, had expired, and who were eligible for reappointment, had been excluded by the council in spite of the protests of the governor; and this had been done to get rid of opponents and confer the offices upon friends of the party dominant in the council. Neither side had as yet attempted, except in rare cases, to remove officials before the expiration of their terms. But as political rivalries became more intense and the party or personal "machine" reached a more perfect development, the practice changed and the "clean sweep" appeared.

Burr is often credited with the first development of the machine, and consequently with all the evils which machine government has entailed. He is charged with the employment of the Tammany organization in New York City to form voters into bodies in which Irish birth or descent formed the bond of union. But at a time when the franchise was still restricted, the city machine built by Burr did not compare in effectiveness with the state machine constructed by De Witt Clinton. And it was Clinton who did more than any other man to extend the use of appointments for partisan purposes by introducing the practice of removal on partisan grounds. Hammond himself, a member of the council of appointment in the following period, a strong partisan and a friend of De Witt Clinton, puts the blame for the corruption of New York politics entirely on the action of the council after 1801, and in a special manner on Clinton. First launched in politics by family influence, De Witt Clinton naturally regarded party organization from the personal side. As secretary to his uncle, Governor George Clinton, he learned the value of patronage in building up a personal following · and his observation of the men who sought office and the means employed to obtain it gave him perhaps

too low an opinion of human nature. Through his methods of political management, adopted in turn by his opponents, the public service was injured in many respects. Not only were the officials who held at the pleasure of their party chief inclined to devote more energy to the service of that chief than to the duties of their offices; but by reason of the growing intensity of party strife, the qualifications for public office were lowered. Men were not wanted who might turn their influence against their chief; political harmlessness became the principal desideratum in an appointee. Small men only were wanted; and the evil results of the political system established by De Witt Clinton were to strike no man more heavily than Clinton himself, as soon as he tried to carry out a great object.

III. *The Council of Appointment from* 1801 *to its Abolition in* 1821.

There is no period in the political history of New York more interesting than that lying between the elections of Jefferson and Jackson. Party rivalry was so intense and party contests so keen as to bring to the front the very ablest leaders; and these developed a genius for organization and a tactical skill which made their campaigns models for the politicians who fought on larger fields. They represent the highest development of politics as an art. But in spite of the perfection of their art — or perhaps because they regarded politics too exclusively from the artistic and too little from the ethical point of view — these leaders constantly overreach themselves: and in the light of their disasters we are often astonished, not at their selfishness, but at their shortsightedness.

Throughout this period the Democrats were generally in power; and the Democrats were regularly divided into warring factions, based more often on the personal rivalries of their leaders than on any difference of opinion upon matters of state or national policy. The main object in dispute was always the control of the council of appointment and, through the council, of the entire patronage of the state. The patronage of New York City was of growing importance, but since the council

appointed the mayor of that city, the faction that controlled the state patronage had a strong hold upon the city patronage as well. The complicated details of these twenty years of New York politics do not concern us in the present study. What we have to examine is the part played by the council of appointment, with such notice only of the chances and changes of political strife as are necessary to explain the doings of this body.

The convention, which was to construe article 23 of the constitution and proclaim the concurrent right of the council to make nominations, had not yet met when Governor Jay's term expired and George Clinton succeeded to Jay's office and to his council. From the first, this council acted on partisan lines by carrying through those appointments against which Governor Jay had protested. The sheriffs of Orange and Schoharie (Blake and Vrooman) were appointed because they were Democrats, not because their predecessors had been guilty of any official or civic misdeed. This was but the beginning of the changes which the council meant to make. At first De Witt Clinton, the leader of the majority, advocated the removal of heads of departments only; but he soon suggested the propriety of dividing the minor offices between the parties, in proportion to their numbers. But as the term of this council neared its end, the number of removals increased. In spite of Governor Clinton's protest and refusal to sign the record, new commissions were issued for all the counties, and all Federalists, whether justices of the peace, surrogates, sheriffs, county clerks or other minor officers, were omitted. In the division of the spoils the Livingstons received all the more important state offices and the Clintons received offices in the counties and in the city of New York. The third great faction in the Democratic party, the following of Aaron Burr, went empty-handed. De Witt Clinton had begun the campaign which was to drive Burr from the Democratic party.

In 1802 the council was changed. De Witt Clinton received a United States senatorship and withdrew from the state senate. The interests of his party were entrusted to his brother-in-law, A. Spencer, now attorney-general. The skill with which

Spencer discharged this duty showed the wisdom of Clinton's choice. The Livingston family, still in friendly alliance with the Clintons, received three justiceships of the supreme court, the other United States senatorship, the mayoralty of New York and the secretaryship of state. A foreign mission was also found for Chancellor Livingston. George Clinton's brother-in-law, Stewart, was restored to the office of district attorney. The Federalists, who were entirely prostrate, and the Burrites, who were proscribed, were rigorously excluded from all offices. The war against the Burrites now necessitated the presence of De Witt Clinton in New York; President Jefferson accordingly appointed Mayor Livingston United States district attorney for New York, and the council of appointment made Clinton mayor of the city. Clinton resigned his seat in the United States Senate to take the mayoralty. He did this because the mayor had great influence and a large salary, and the mayoralty gave him the best opportunity to cripple the Burrites. The decisive trial of strength between the factions took place in the election of a governor to succeed George Clinton, who had been nominated to the vice-presidency of the United States. Against Burr the Clintons and Livingstons set up Lewis, who belonged to the Livingston faction. The result of the election is well known; Burr, defeated by the support which Hamilton and the Federalists gave Lewis, killed Hamilton and ceased to be a factor in politics.

The victory over Burr was followed by a rupture between the leaders of the victorious coalition. The real cause of the quarrel was the employment which Lewis and his council made of the state patronage. In De Witt Clinton's judgment, the Clintons received too little and the Livingstons too much. The question of a bank was merely the pretext. In order to combat the "Quids" or Lewisites, Clinton tried to effect a fusion with the Burrites. The Quids allied themselves with the Federalists. The ensuing struggle was full of vicissitudes. In 1806 Clinton obtained control of the council; and that body, in spite of the protests of the governor, proceeded to turn out those members of the Livingston family who held the offices of secretary of

state and recorder of New York City, to remove the Lewisite justices of the peace, sheriffs, surrogates and county clerks, and to appoint to the vacant places about 6000 Clintonians. In New York City, on the other hand, the combined anti-Clintonian factions obtained a majority in the common council and forthwith proceeded to turn out of office all the friends of the mayor. The city now begins to influence the course of Albany politics. In 1807 the Lewisites in the assembly secured, by a trade, enough Federalist votes to elect a Lewisite council of appointment. This council began to undo all of Clinton's work by removing him from the New York mayoralty, and restoring the Livingstons to the offices they had lost in the preceding year. Clinton now raised the cry that the Livingstons were only an aristocratic clique; and on this issue he secured the regular nomination for Tompkins, who was to be his tool. Clinton and his brother-in-law, A. Spencer,[1] were successful in defeating the Lewisite faction and electing Tompkins governor. The Clintonians had also secured the assembly, and thus the council of appointment. The council elected in February, 1808, again made a "clean sweep" of all Lewisites, and restored the Clintonians to office. De Witt Clinton again became mayor of New York City. Before its term expired this council removed from office all hostile justices, *i.e.* nearly all the justices.

In 1809 and 1810 the state was carried by the Federalists. When one recalls what admirable lessons they had received from the factions of the Democratic party, their appetite for the spoils is comprehensible and, according to the political morality of the time, justifiable. The Federalist council extended its scrutiny for offensive partisanship to clerks of counties, sheriffs, district attorneys, judges of courts of common pleas, surrogates and justices of the peace, and carried out a general proscription. But the Federalist success was short-lived, and in 1811 the Democratic party again came into power under the leadership of the Clintons. The Federalist appointees were ousted and

[1] Since 1804 Spencer had been a member of the supreme court, but had continued to be active in politics. Through his influence over the justices whom he met at county sessions he had constructed a machine which was of great service to the Clintonians.

the Clintonians reinstated. After remarking that this change affected all grades of office-holders, from the highest to the lowest, Hammond writes: "But in truth, the public mind had become so accustomed to see men ejected from office on account of their opinions, that such changes ceased to be matters of surprise or to produce any excitement."

De Witt Clinton had the state patronage again under his control. He had long intended to use his supremacy in New York as a means of reaching Washington. He had long aimed at ousting the Virginians from the control of national affairs. He had opposed the policy of the national administration, and in revenge the federal patronage had been used to undermine his influence in New York City. In 1812 he ran against Madison for the presidency and was defeated. Governor Tompkins had already quarrelled with him; and in 1815 Tompkins, with the entire state patronage now in his hands, in union with Tammany, the Lewisites and the Federalists, overthrew Clinton completely and put him out of the Democratic party. It was the vote of New York City that had contributed most largely to his defeat, and Clinton promptly changed his base of operations to the rural counties. He became the leading advocate of the great canal system from the lakes to the Hudson, with which his name is indissolubly linked. Beaten in small politics he turned to greater issues, and appealed to the people with a statesmanlike policy. On this issue Clinton's friends carried the assembly and obtained control of the council; and Clinton himself became governor in 1817. The lesson of the past years had not been wasted on him; and although in control of the council of appointment, he attempted no general proscription of his enemies. But he could not quite forgive the Burrites of Tammany Hall, and a few Tammany office-holders were turned out.

At this time the historian Hammond entered the senate and was elected a member of the council, so that the sessions after 1818 are described by an actor in the party struggles. Van Buren was now the most prominent political manager. He had the Tammany organization behind him and was the leader of

the "Bucktail" faction. By his adroit management, a council was elected which had the air of being Clintonian, but which, with the exception of Hammond, was Bucktail. This council began to remove Clinton's friends: these clamored for reprisals; and the Bucktails were driven from the party. They in turn "bolted" the regular or Clintonian nominees to such a degree that Federalists slipped into their places. Clinton found his administration hampered by the claims of three factions. The Federalists who had helped the true Clintonians elect the governor were waiting for their rewards; and the Bucktails under Van Buren were trying to detach the Federalists from the Clintonians. Clinton again controlled the council, and did not mean to give the Bucktails offices after they had opposed his nomination. In July, 1819, the council, which for months had been substituting Clintonians and Federalists for Bucktails in all minor offices, removed Van Buren from his office of attorney-general and put into his place a Federalist. From this point on the friends of Clinton were the only recipients of office. The council of 1820 had very few chances to make any removals for political reasons, as "by this time the offices were nearly all filled by Clintonians." Clinton had been driven back into his old methods; and the elections of this year showed at once their strength and their weakness. Clinton himself was re-elected by a great majority, but without any party in the legislature. Clinton owed his election to the use of patronage in the canal counties, to the faith he had kept with the Federalists in the distribution of offices, and to the fact that the Bucktails (now, by Van Buren's clever management, the regular Democratic party) had been forced to accept Clinton's canal policy.

But by this time the system of which Clinton was the author was hopelessly discredited. The council and its methods had fallen into general *disrepute*. Already in 1818 a Tammany assemblyman had introduced a bill to call a convention of the people for the reform of the council of appointment. The very word convention suggested the question of the franchise; and Hammond claims that he tried to persuade Clinton to overbid

Tammany by raising this question. This Clinton refused to do; and the Bucktails were prompt to seize the popular issue. Now that this faction controlled the legislature, the demand for a convention was at once formulated. The governor wished that the electorate should decide whether a convention should be called, and that the convention, if called, should submit its work on limited topics to the people. This, however, the Democrats did not want, and finally a convention with sovereign powers was called.

At the same time the anti-Clintonian assembly elected an anti-Clintonian council — the famous "Skinner Council." Its performances were not calculated to lessen the now general dislike of the council of appointment. It repaid De Witt Clinton for his actions in the councils of Jay and George Clinton. Hammond describes Senator Skinner's politics in these words:

> He had been educated in a school of politics which taught him to believe that every legal measure ought to be taken to diminish the power of an opponent, and that to the "victors belong the spoils." This maxim, which has been so much the subject of animadversion and has been for many years denounced by all parties in the state when in the minority, has been practised by each and every party when in the majority. I do not affirm that the practice has been right, but I state as a historical fact that such has been the practice.

This council removed at its first sitting eleven sheriffs; the comptroller, whom even the councils of 1807, 1810, 1813 and 1814 had not removed; and the new attorney-general. It removed several military officers because they were Clintonians, and in this point greatly offended public opinion, because this was the one class of officials that De Witt Clinton had not disturbed. Besides this, it removed the Clintonian mayor and recorder of New York City. The governor refused to sign the council record; but since 1801 the appointments were valid without the signature of the president, as Governors Clinton and Lewis had learned from De Witt Clinton. After a few days' rest, Skinner's council began a proscription which in the end was carried out so thoroughly that in the following year

no office could be filled without removing one of its appointees. And yet it was only doing what the "common law of party" had come to allow.

The new convention met in Albany, August 28, 1821. It was a very different body from the convention of 1801, and it assembled under very different auspices. In 1801 the convention was limited to a question of construction; and both political parties had, when in power, prejudiced their decision on the question at issue. In 1821, however, the convention could amend the constitution in any point: it was really a constituent assembly. It does not fall within the province of this paper to explain why the convention disregarded Kent's prophetic words and politic warnings and broke down the barriers of the suffrage, nor to discuss the other important changes which it introduced in the fundamental law of the state. What here concerns us is the way in which it dealt with the appointing power.

The convention had organized by electing the Vice-President of the United States (ex-Governor Tompkins) president, and providing for an excellent corps of reporters. The general headings to be discussed were given to special committees, whose reports were discussed in committee of the whole. The chairman of the committee on the appointing power was Martin Van Buren, whom the council had twice turned out of office for partisan reasons. On the 17th of September Van Buren reported from his committee the following:

> That the council of appointment should be abolished; that all militia, with the exception of major-generals and the adjutant-general, should be elected by persons subject to perform military duty; that most of the state officers, such as the comptroller, the secretary of state, the surveyor, *etc.*, should be appointed by the two houses of the legislature in the manner senators of the United States were appointed; that the governor should nominate, and by the consent of the senate, appoint all judicial officers (except justices of the peace, who were to be chosen by the people) and sheriffs of counties; that clerks of courts should be appointed by the courts of which they were clerks; and that no judicial officer should be removed, except by the majority of the senate upon the recommendation of the governor, setting forth the cause of the removal.

To this report there was an appendix, which showed that each annual council had the disposal of 14,950 offices — 8287 military, and 6663 civil. The military officers, it is true, had seldom been removed on partisan grounds; but on the other hand, the very short terms of some of the county commissions multiplied the number of civil positions which the party in control might and did use for electioneering purposes.

The effect of Van Buren's report on the convention is shown in the unanimous vote of one hundred and two members to abolish the council of appointment. The convention then proceeded (October 1) to consider the report in committee of the whole.

The report proposed a division of the appointing power between the state government and the people. It proposed to vest in the voters the appointment of the greater number of the minor officers. This measure was inaccurately described as a "restoration" to the people of the appointment of their officers. It is not known whether the primitive Germans possessed such an appointing power in the times of Tacitus, but it is certain that their descendants in this country never had it till this convention gave it to them. Of the military offices, 8209 were to be filled by the votes of the militia; the seventy-eight remaining posts were to be kept as state patronage; 3641 civil offices of a distinctly non-political character, which were commonly sought and conducted as a business (*e.g.* notaries, auctioneers, *etc.*), were to be filled by the legislature. The justices of the common pleas and of the peace were to be elected; and then, as county courts, they were to appoint the clerks of the courts and the district attorneys. In all cities except New York, the common council was to elect the mayor and city clerk.

There were still 453 offices not covered by these proposals, and to which the new panacea of election seemed inapplicable. In other words, there was still so much patronage to be assigned. Four solutions were considered: (1) the election by the people of a council of appointment; (2) appointment by the governor alone; (3) appointment by the two houses of the legislature; and (4) appointment by the governor and senate, on the United

States plan. The committee favored the fourth plan, at least for the higher judicial officers. As regarded the higher military officers, some members of the committee favored appointment by the governor alone.

As regarded the tenure of officers, the committee proposed that in all cases except the legislative appointments, removals from office should be made only for cause stated.

In the main the convention carried these recommendations into effect. There were, of course, divergent views. General Talmadge was opposed to giving the senate any control over the appointing power; while Edwards, the original advocate of the reform, would have "restored the appointing power to the people." The people, however, were not generally looked on as the fit distributors of the offices. This was indicated by the number of propositions for new appointing boards. Among these, Van Buren's scheme of securing for his party the appointment of the county justices is noteworthy. In this plan the governor was to appoint from a list of candidates drawn up by the county supervisors. This plan was accepted, and its effect was so far to perpetuate the old system as to make possible the Albany Regency. The important question as to the sheriffs was settled by giving the people the right to elect them as well as the county clerks. The state officers, as proposed by the committee, were for the most part to be elected by the legislature. What was left of patronage was given to the governor and the senate. Hamilton's prophecy had proved true, that the system of appointment devised at Philadelphia would outlast that constructed at Kingston.

The purpose of this essay is attained. We have seen that the appointing power was from the first the central point of political conflict; that the contest between the crown and the people, in the colonial period, was mainly a struggle for the control of the patronage; that the authors of the first state constitution, realizing the dangerous character of the appointing power, endeavored to divide it between the executive and legislative branches; that this division proved illusory, and the legislature grasped the full control of all appointments. We have

seen how easily the council of appointment lent itself to the abuse of patronage, and how this abuse increased the importance of single leaders, personalized politics and made the state a battle-field of selfish interests. But we have also seen that this system was condemned as entirely un-American as soon as the great mass of the hitherto unrepresented subjects of the state attained political influence.

In 1825, near the termination of his career, De Witt Clinton recognized, in the following words, the advance that had been made:

> The causes which led to our divisions and distractions no longer predominate. We are emancipated from the thralldom of a system of patronage which formed a component part of our former constitution, and whose direct tendency and inevitable operation were to agitate the community with incessant convulsions; to make personal gratification the standard of political orthodoxy; to render the state the victim of political machinations at home and from abroad; and to convert the very favors conferred by its bounty into the instruments of its vassalage and degradation. . . . The patronage once vested in a council of appointment is now diffused; and political power, which under the former state of things was in many respects concentrated in petty aristocracies and wielded by factious combinations, has been, in a great measure, restored to its authentic source, the great body of the people.

Hammond's words are also worth recalling. In writing of the action of the convention of 1821, he says:

> The adoption of those amendments by the people broke into fragments and virtually annihilated a power which for nearly half a century had distributed in every quarter of the state the spoils of victory of the one party over the other; which, by its sovereign will and pleasure, had prostrated as well the high and exalted state officer in the capital as the humble justice of the peace, secluded in the western or northern wilds — a power which, by elevating some and depressing others, had nourished faction and frequently produced a state of feeling in the public mind which threatened a dissolution of the bonds which unite together a civilized and Christian community. . . . In the first part of these sketches, I have remarked that the principal cause why party spirit had raged more in this than in any other state in the Union, was the peculiar organization of the appointing power under the constitution of 1777. A review of our political history will, I believe, satisfy all intelligent and reflecting men that the proposition is strictly true.

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